the contempt occurred under the eye of the court. Since no trial of any sort is required for such a determination, the constitutional guaranty of a "public" trial has no application to proceedings under Rule 42(a).

B. The contempt adjudication, though made when the general public was excluded, did not have the injurious characteristics associated with "secret convictions". Admittedly, the courtroom in which petitioner's adjudication took place had, sometime prior to the adjudication, been cleared of the general public by order of the court, and this order, the propriety of which is not open to question, had not been rescinded at the time of the contempt adjudication. Petitioner's counsel, however, was present and active on behalf of petitioner throughout the proceedings, vigorously representing his interests. The proceedings were fully reported and subsequently spread on record; and there is no suggestion of any unfairness to the petitioner on the part of anyone. These circumstances make this case wholly unlike the secret conviction by a one-man judge-grand jury involved in *In re Oliver*, 333 U.S. 257. The contempt involved in *Oliver*, moreover, consisted of alleged perjury before the judge-grand jury and consequently involved sharply disputed issues of fact, whereas here there was no factual issue at all but only the legal question of whether petitioner's refusal to answer questions was lawful.

Petitioner was not denied due process because his summary adjudication was for a contempt not committed "in open court". The fact that the public was

excluded (for a proper reason) from the proceeding at which the contempt occurred had no material bearing on the propriety of the summary adjudication. It was the fact that the act of contempt was witnessed by the judge that made the case a proper one for summary adjudication.

C. Petitioner suffered no prejudice from the non-public character of the adjudication. The proceedings prior to the adjudication were properly non-public, being essentially a continuation of the grand jury inquiry. Especially in the absence of any objection on this score, petitioner was not prejudiced merely because the court did not dissolve the closed grand jury proceeding as such, and reopen the courtroom to the public for the purpose of listening to legal arguments it had already considered and of making the formal contempt adjudication. Moreover, petitioner's objection to the non-public character of the proceedings, first made on appeal, came too late.

ARGUMENT

THE ADJUDICATION OF PETITIONER IN CRIMINAL CONTEMPT WHILE THE ORDER EXCLUDING THE GENERAL PUBLIC FROM THE COURTROOM FOR THE GRAND JURY PROCEEDING WAS STILL IN EFFECT DID NOT INFRINGE ANY OF PETITIONER'S RIGHTS OR PREJUDICE HIM

A. PETITIONER WAS ENTITLED TO NO TRIAL AT ALL, SINCE HIS CONTEMPT WAS PROPERLY ADJUDICABLE SUMMARILY; THE "PUBLIC TRIAL" GUARANTY OF THE SIXTH AMENDMENT WAS ACCORDINGLY INAPPLICABLE

In *Brown* v. *United States*, *supra*, 359 U.S. 41, 47–52, this Court held, in a companion case (see *supra*,

p. 4, fn. 1, and p. 6), that where a witness before a grand jury commits contempt by refusing to obey a court order directing him to answer specific questions (thereby rendering himself liable to be proceeded against for contempt in accordance with the "notice and hearing" provisions of Rule 42(b) of the Federal Rules of Criminal Procedure), the judge may in his discretion give the witness another chance to answer the questions at a session of the grand jury presided over by the judge. Following this procedure, if the witness persists in refusing to answer (this time in the judge's actual presence), he may be summarily adjudicated in contempt in accordance with the "summary" procedure prescribed by Rule 42(a) (*supra*, p. 3). This holding, it is submitted, governs the outcome of this case as well.

Petitioner's basic contention—essentially his only contention now before the Court—is that the fact that his contempt adjudication was made under conditions of "secrecy" of a sort[*] deprived him of the right to a "public trial", which the Sixth Amendment grants to the accused in "all criminal prosecutions" (Br. 8-17). But in the case of a summary contempt adjudication under Rule 42(a) there is no trial at all; the essence of such a determination is precisely that no trial or hearing is required because the contempt occurred under the eye of the court. *Ex parte Terry*, 128 U.S. 289; *Cooke* v. *United States*, 267 U.S. 517, 534-535; *Sacher* v. *United States*, 343 U.S. 1, 9;

[*] As we point out *infra*, pp. 15-17, the secrecy at the time of the adjudication was of a wholly different kind from the sort typically associated with the idea of a "secret conviction".

Brown v. *United States*, *supra*, 359 U.S. at 51. At least where, as here, the question whether there has been a contempt involves no disputed factual issue (see *infra*, pp. 16–17), but solely a legal question (in this case, whether the refusals to answer were legally justified), a "trial"—in the ordinary sense of a hearing to ascertain whether a charged act of misconduct in fact took place—would be unnecessary, since the judge personally witnessed the conduct constituting the contempt. Under such circumstances, as this Court held in *Ex parte Terry*, *supra*, 128 U.S. at 309, it is competent for the district court, "immediately upon the commission, in its presence, of the contempt * * *, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form".[11] And since trial of any sort may be dispensed with under such circum-

[11] The act of contempt involved in *Terry* was one of physical violence which interrupted the orderly conduct of a pending trial (assault on a marshal while he was carrying out an order of the presiding judge to remove a misbehaving person from the courtroom). But that the rule of that case is not limited to contempts of a violent nature which actually interrupt courtroom proceedings is clear from *Brown* v. *United States*, *supra*, 359 U.S. 41, where the rule was applied to an act of contempt consisting (as here) of a refusal to answer questions. The application of the rule in *Brown* was in accord with accepted principles, since the rationale of *Terry* was that it is superfluous for a judge who has personally witnessed the misconduct constituting the contempt to conduct a trial to determine whether it happened. Cf. *Sacher* v. *United States*, *supra*, 343 U.S. at 9. This is equally true regardless of the character of the act of misconduct in question, provided the contempt is one that is properly adjudicable summarily. As noted *infra*, pp. 14–15, not all contempts in the actual presence of the court can be proceeded against summarily.

stances, the constitutional guaranty of a "public" trial has no application to proceedings under Rule 42(a).

Moreover, it is plain that there are several situations in which punishment was intended by Rule 42(a), *supra*, p. 3, to be imposed, summarily and immediately, in the course of proceedings from which the public is properly excluded. A contempt in the presence of a judge holding a chambers conference or hearing on a case (*e.g.*, discussing a proposed charge to the jury), or committed at a bench conference outside the hearing of the jury and the public, can validly be adjudicated at that very moment. There is no prohibition, where the court proceeds summarily to punish a contempt in chambers or at the bench, against making the adjudication right then and there, without any trial or opening the proceedings to the world.

It is true that not all contempts committed in the face of the court are adjudicable summarily. In *Offutt* v. *United States*, 348 U.S. 11, for example, this Court held that where the acts of alleged contempt, though committed in the face of the court, are of such a nature as to make it desirable that the adjudication (if any) be made by another judge after notice and hearing, that procedure should be followed rather than the summary procedure prescribed by Rule 42(a).[*] In such a case the hearing would be in ac-

[*] In *Offutt*, the reason why it was thought desirable that another judge hear the charges and make the adjudication was the fact that the judge in whose presence the acts in question had occurred had become "personally embroiled" with the al-

cordance with Rule 42(b) and the accused, as in the case of the accused in any trial, would be entitled to have the hearing public. But where (as *Brown* establishes is the case here, 359 U.S. at 47–52) the contempt is properly adjudicable summarily under Rule 42(a), there is no right to a "public" trial because there is no right to any trial."

B. THE CONTEMPT ADJUDICATION, THOUGH MADE WHEN THE GENERAL PUBLIC WAS EXCLUDED, DID NOT HAVE THE INJURIOUS CHARACTERISTICS ASSOCIATED WITH "SECRET CONVICTIONS", NOR DID IT DEPRIVE PETITIONER OF DUE PROCESS

The questions presented (*supra*, p. 2) refer to the "secrecy of the proceedings" in which petitioner was adjudicated in contempt, and petitioner attempts to equate his contempt conviction to the kind of secret contempt conviction which this Court condemned in *In re Oliver*, 333 U.S. 257 (Br. 8–13). The cases, however, are wholly dissimilar.

The petitioner in *In re Oliver*, appearing as a witness before a state one-man judge-grand jury engaged in a secret investigation of crime, was summarily charged with and convicted of contempt for giving testimony believed by the judge-grand jury to be false on the basis of other testimony heard by the judge-

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legal contemnor (348 U.S. at 17). Cf. *Cooke* v. *United States*, *supra*, 267 U.S. 517, 539. Here (as in *Brown*) the record shows nothing in the nature of a personal or emotional embellishment on the part of the judge; on the contrary, the record shows that the judge maintained a calm and judicial composure at all times.

" As we point out *infra*, pp. 16–17, no issue of fact was involved in the contempt adjudication, but only the legal issue of whether petitioner's undisputed refusal to answer questions was lawful.

jury in the petitioner's absence; the entire proceeding was secret, the petitioner having no opportunity to secure counsel, prepare a defense, cross-examine the other witness, or summon witnesses to refute the charge against him.

The present case has little in common with *Oliver*. Admittedly, the courtroom in which petitioner's adjudication took place had, sometime prior to the adjudication, been cleared of the general public by order of the court. This order—the propriety of which is not open to question [12]—had not been rescinded at the time of the contempt adjudication. Petitioner's counsel, however, was present and active on behalf of petitioner throughout the proceedings, vigorously representing his interests every step of the way (*supra*, pp. 5–9). The proceedings themselves were fully reported and subsequently spread on the record; and there is no suggestion of any overreaching or unfairness to the petitioner on the part of the judge, government counsel, or any other person present. In *Oliver*, the contempt consisted of alleged perjury (and consequently involved sharply disputed issues of fact), but here there was no factual issue at all but only the legal question (since settled by *Brown*, 359 U.S. at 44–47) of whether petitioner's undisputed refusal to answer questions was lawful. The adjudication at bar is thus wholly unlike the secret

[12] Since the judge was about to conduct in the courtroom a grand jury session, to be presided over by him, at which petitioner was to be given another opportunity to answer the questions which he had previously refused to answer in the grand jury room, there can be no question as to the propriety of this order. Cf. *Brown* v. *United States*, *supra*, 359 U.S. at 43, 50.

conviction involved in *Oliver*, and has none of the odious features typically associated with a "secret conviction".

Likewise without merit is the contention (Br. 20–21) that the summary contempt adjudication denied petitioner due process because the contempt was not committed "in open court" (Br. 20), *i.e.*, in a proceeding open to the public. As we have pointed out (*supra*, p. 14), Rule 42(a), *supra*, p. 3, is not limited to contempts committed in "open" court; it applies to any contempt committed "in the actual presence of the court", as, for instance, in a chambers conference between the opposing counsel in a case and the judge, or at a bench conference between the attorneys and the judge (out of the hearing of the jury and the public). The fact that here the public was excluded from the proceeding at which the contempt occurred—for an entirely proper reason, as we have pointed out (see fn. 13, *supra*, p. 16)—had no material bearing on the propriety of the summary adjudication. The only significant consideration was that the act of contempt occurred in the actual presence of the court and was seen and heard by the judge. Since the issue of whether a contempt had occurred involved no factual question, but, as previously noted (*supra*, p. 16), solely an issue of law, the filing of a notice of charges and the holding of a hearing was not necessary.[14]

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[14] Petitioner's reliance on *Cooke* v. *United States*, 267 U.S. 517, on the due process aspect of his argument (Br. 20), is misplaced. Citing that decision and the previously discussed *Oliver* case (see *supra*, pp. 15–17), he argues that "summary adjudication and punishment is Due Process only when the contumacious act is committed in 'open court'" (*ibid.*). "It is not enough to

C. PETITIONER SUFFERED NO PREJUDICE FROM THE NON-PUBLIC CHARACTER OF THE ADJUDICATION, OF WHICH HE FIRST COMPLAINED ON APPEAL

The proceeding of April 22, 1957, in the cleared courtroom in the presence of the grand jury presided over by the judge (*supra*, pp. 5 *ff*) was essentially a proceeding to afford the petitioner a further opportunity—a *locus poenitentiae*—to comply with the court's direction that he answer the questions before the court faced the necessity of adjudicating him in contempt. *Brown* v. *United States*, *supra*, 359 U.S. at 50-52. If the petitioner ever had a right to have the courtroom reopened to persons in addition to his counsel, that right could only have arisen after it finally became apparent that, by virtue of his persistent refusal to testify, the inquiring function of the grand jury was thwarted and all that remained was the formal adjudication by the court of the contempt."

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confer such summary jurisdiction", he says, "that the wrongful act be committed in the face of the court" (*Ibid.*). The *Cooke* case is authority for no such distinction. On the contrary, the Court in that case used the phrases "under the eye or within the view of the court", "in open court", "in the face of the court", and "in *facie curiae*" interchangeably (267 U.S. at 536). In *Cooke* the act of contempt (the sending of an insulting letter to a judge in chambers) did not take place, as here, "in the face of the court" and "under the eye" of the judge, and it was for that reason that this Court held the procedure of summary adjudication to have been improperly invoked.

" Petitioner contends (Br. 17-20) that his "right to a public hearing accrued no later than the time when he was directed to take the stand by the District Court" (Br. 17) and that "the entire proceedings on April 22, 1957 (R. 30, *et seq.*) were a trial, because petitioner was in jeopardy of his liberty" (Br. 18). This argument misconceives the nature of those proceedings. As indicated in the text, the April 22d proceeding was designed to

Petitioned not only failed to assert any such right, either in person or by counsel, but he cannot in any manner show that he was prejudiced by the procedures which followed.

All that took place after the court stated that it would "listen to any reason why I should not [summarily] adjudicate this witness in contempt", as requested by counsel for the government after the petitioner's final refusal in the presence of the court and grand jury to answer the questions, was the reiteration by petitioner's counsel of his contentions that the immunity provision did not extend to petitioner and that any contempt proceeding against petitioner was required to be in accordance with Rule 42(b); the court then announced its adherence to its prior rulings (R. 43; *supra*, pp. 8–9). The adjudication of contempt (R. 43) and the sentence imposed (R. 45) immediately became matters of public record,

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give petitioner another opportunity to obey the court's order to answer the questions. It was essentially, as petitioner concedes that this Court held in the case of the corresponding proceeding in the *Brown* case, "a continuation of the grand jury proceeding" (Br. 18). Hence, when the judge directed petitioner to take the stand, the direction was given to him in his capacity as a grand jury witness, not as the accused in a contempt proceeding. Cf. *Brown*, 359 U.S. at 43, 50. The judge's remark that he was "proceeding in accordance with Rule 42(a)"—which he made in colloquy with counsel for petitioner after petitioner had been directed to take the stand (R. 39; see *supra*, pp. 7–8), and which petitioner cites as proof that the court considered the pending proceeding as a contempt proceeding (Br. 18, 19–20)—meant no more, when read in context, than that the judge *would* proceed under Rule 42(a) to punish petitioner for contempt if he persisted in his refusal to answer the questions after being given a further opportunity to do so.

and there was no attempt on the part of the court or government counsel to conceal the proceedings. Since the courtroom session of April 22d was essentially a continuation of the grand jury's meeting and was for that reason properly conducted in the absence of the general public, there was certainly no defect in the proceeding up to the moment the court announced that it would listen to argument why petitioner should not be adjudged in contempt (*supra*, pp. 16, 18–19). In these circumstances, and especially in the absence of any objection on this score, petitioner was not prejudiced merely because the court did not at that point dissolve the closed grand jury proceeding as such, and reopen the courtroom to the general public for the purpose of listening to the same legal arguments it had already considered and of making the formal contempt adjudication. This was the most that petitioner would have been entitled to, had he raised the point at all. Consequently, even if it be assumed *arguendo* that the failure of the court to reopen the courtroom to the public before pronouncing judgment constituted a defect in procedure, the defect was at most a matter of harmless error.[16] For the reasons previously stated, however, we do not concede that there was any error at all.

Finally, as we have seen (*supra*, p. 9), petitioner's objection was first made on appeal. It is submitted, therefore (particularly in view of the claimed error's

[16] See 28 U.S.C. 2111: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties".

non-prejudicial character), that the objection came, as the court of appeals held in regard to the similar objection in the *Brown* case, 247 F. 2d 332, 338–339, too late."[11]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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FEBRUARY 1960.

[11] On Brown's appeal, the court of appeals, apparently assuming that the courtroom was closed to the public at the time of Brown's adjudication in contempt (though the record, as this Court later observed (359 U.S. at 51, n. 11), did not show that to be the fact), and noting the presence of Brown's counsel and his failure to object, held that Brown had "no standing to complain now" (247 F. 2d at 339).

U.S. GOVERNMENT PRINTING OFFICE: 1960